IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAVIER QUEREGUAN, and AUREA E. QUEREGUAN,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 20298-VCP
NEW CASTLE COUNTY, a political subdivision of the State of Delaware,	)	
Defendant/ Third-Party Plaintiff,	)	
v.	)	
STATE OF DELAWARE,	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION

Submitted: June 28, 2010
Decided: October 22, 2010

Javier Quereguan and Aurea E. Quereguan, Wilmington, Delaware, *Pro Se Plaintiffs*

James A. Robb, Esquire, NEW CASTLE COUNTY, New Castle, Delaware, *Attorney for Defendant and Third-Party Plaintiff*

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PARSONS, Vice Chancellor.

This matter arises out of a long-running dispute between the owners of a home and New Castle County (the "County"), which operates a community center on neighboring public property. Sometime after purchasing the home, the homeowners began noticing that after heavy rain or snow water jetted through cracks in a retaining wall that runs the span of their rear property line and excess water remains on their property long after the precipitation ceases. The retaining wall elevates a ball field adjacent to what was previously a public school and is now the community center. At times, and especially after heavy rainfall, surface waters from neighboring properties to the north and water emanating from the retaining wall inundate the homeowners' backyard. The homeowners contend that during periods when the County had a lease to use the neighboring property, water drained from the ball field onto their property in a way that renders the County liable for the resulting damages.

The operative Complaint names as Defendant, the County, which leases the interior portions of the former school for use as a community center. The County filed a third-party indemnification claim against the State of Delaware (the "State"), which owns the building and adjacent ball field, for any damages awarded against it based on Plaintiffs' claims.

Master in Chancery Samuel Glasscock, III held a trial on the issue of liability on May 5-6, 2008, and entered a Final Report in favor of the County on October 8, 2009. In late December, the homeowners requested a new trial before this Court. Though their petition for a new trial was untimely under Court of Chancery Rule 144, that rule still entitles Plaintiffs to a *de novo* review of the Final Report by this Court. Plaintiffs also

sought to have the Court consider certain additional evidence in its review. By Letter Opinion dated June 18, 2010, I granted Plaintiffs' request in part and denied it in part. Since then, I carefully have reviewed *de novo* the trial record and the supplemental evidence I admitted. For the reasons discussed in this Memorandum Opinion, I conclude, as did the Master in his Final Report, that judgment should be entered in favor of the County and Plaintiffs' claims should be dismissed. In addition, the County's cross claim against the State should be dismissed as moot.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiffs, Javier and Aurea E. Quereguan, are husband and wife. Together with their daughter Joanne A. Quereguan (collectively, the "Quereguans"), they live at 320 Maple Avenue, Wilmington, Delaware. The County is a lessee of interior portions of what used to be the Absalom Jones School ("Absalom Jones") in which it runs a community center. The State owns the Absalom Jones building and an adjacent raised ball field with a retaining wall that elevates the field to a level roughly equal to that of the building. Between 1975 and 2002, the Red Clay Consolidated School District ("Red Clay") owned the building and ball field, and had a lease with the County. On August 1, 2002, Red Clay sold the Absalom Jones property to the State.

The State and the County have entered into a series of leases, the first of which is dated October 15, 2002 (the "2002 Lease"), under which the County leases certain

interior portions of the building from the State.[1] Under the 2002 Lease, the State retained responsibility for maintenance and repair of the grounds and structures of Absolom Jones.[2]

B. Procedural History

Regrettably, the procedural history of this case is both long and tortuous. Javier Quereguan ("Quereguan") first filed suit against the County, Red Clay, and the State (the "Original Defendants") on January 10, 2003 in the Superior Court.[3] In his Complaint, Quereguan alleged that the Original Defendants failed to properly maintain the Absalom Jones retaining wall, thereby allowing water to leak through and injure his property; he requested relief in the form of damages and repair of the wall.[4] Each of the Original Defendants moved to dismiss. The State also sought summary judgment on the issue of damages. After hearing these motions, Judge Del Pesco dismissed the case subject to Quereguan's right to request a transfer to the Court of Chancery, which Quereguan subsequently exercised.

After hearing the remaining issues on the motions to dismiss, I issued a Letter Opinion on September 28, 2004, granting Red Clay's motion without prejudice to

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1 Def. State of Del.'s Opening Br. for Summ. J. on Issue of Sovereign Immunity, Ex. A, at 1-2.

2 *Id.* ¶ 5(D).

3 The underlying dispute dates back even earlier to approximately 1996. Compl. ¶ 11.

4 *Id.* at Request for Relief ¶¶ (a), (c).

Quereguan's ability to seek to amend his Complaint.[5] I also denied both the State's and the County's motions to dismiss,[6] but granted the State's summary judgment motion on damages because I found that the State was entitled to sovereign immunity. The State later sought re-argument on its motion to dismiss. In a Letter Opinion dated November 24, 2004, I granted the State's motion and held that it was protected from Quereguan's claims for injunctive relief, as well, under the doctrine of sovereign immunity.[7] Hence, the County was the only remaining Defendant.

On July 14, 2005, the County filed a third-party cross claim against the State, alleging breach of the 2002 Lease and seeking indemnification from the State for any liability it might incur with respect to the retaining wall. The State subsequently moved to dismiss the third-party claim, but I denied that motion in a Memorandum Opinion dated April 24, 2006.[8]

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5 Quereguan did not move to amend his Complaint in a timely manner. As a result, he lost his right to pursue Red Clay in this litigation.

6 *See Quereguan v. New Castle Cty.*, 2004 WL 2271606, at *5 (Del. Ch. Sept. 28, 2004).

7 *Quereguan v. New Castle Cty.*, 2004 WL 3038025, at *2 (Del. Ch. Nov. 24, 2004).

8 *Quereguan v. New Castle Cty.*, 2006 WL 1215193 (Del. Ch. Apr. 24, 2006). I later denied motions by the State for re-argument and severance of the claims against it. *Quereguan v. New Castle Cty.*, 2006 WL 252214 (Del. Ch. Aug. 18, 2006).

Meanwhile, on July 26, 2005, Quereguan moved to amend his Complaint to add personal injury claims and two additional plaintiffs: his wife, Aurea, and his daughter Joanne. I granted that motion in a Letter Opinion dated September 20, 2006.[9]

On October 6, 2006, this action was reassigned to Master Glasscock. In 2007, the parties unsuccessfully attempted to mediate their disputes before another Vice Chancellor under Rule 174. Thereafter, at a scheduling conference on December 18, 2007, it was agreed that Master Glasscock would hear the issues regarding liability, including the parties' dispute as to the natural flow of water onto the Quereguans' property and I would retain the outstanding sovereign immunity issues.

On February 25, 2008, the County filed a motion to dismiss based on the Quereguans' failure to comply with this Court's Rules. In a Final Report dated April 22, 2008, Master Glasscock denied the County's motion to dismiss to the extent it challenged the sufficiency of the pleadings, but granted their motion as to the Quereguans' personal injury claims. The Quereguans filed a timely exception to that report as it related to the personal injury claims, but I stayed briefing on that exception until after the Master decided the remaining liability issues before him. On March 24, 2008, the State moved for summary judgment in its favor on the County's indemnity claim and breach-of-lease argument. The Master denied that motion with regard to indemnification but continued the motion as to the 2002 Lease until after trial.

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[9] *Quereguan v. New Castle Cty.*, 2006 WL 2925411 (Del. Ch. Sept. 20, 2006).

Master Glasscock held a two-day trial on May 5-6, 2008 and released a Draft Report on January 2, 2009. The Quereguans filed timely exceptions on January 8, 2009, as well as two supporting briefs on July 17, and September 17, 2009, respectively. On October 8, 2009, the Master issued his Final Report with little change from the Draft Report. On the same day, he notified the parties by letter that any exceptions had to be filed by October 18, 2009.

On December 21, 2009, nearly ten weeks after the time for filing exceptions expired, the Quereguans moved for re-argument and reconsideration of their case. I denied that motion under Rule 144 as untimely. Nevertheless, I allowed the Quereguans to make a proffer as to any additional evidence they sought to have the Court consider in connection with its *de novo* review of the issues addressed in the Master's Final Report. The Quereguans then submitted an additional brief and accompanying exhibits ("Plaintiffs' Submission"),[10] which both the State and County moved to strike. Plaintiffs' Submission included matter relating to the Quereguans' personal injury claims as well as the issues of liability and causation. I denied the motion to strike with regard to matters pertaining to the personal injury claims pending my review of the Master's Report.[11] I also denied the motion as to a number of exhibits pertaining to the issues of liability and causation, because they either already were part of the record before the Master or were sufficiently relevant that their admission would not prejudice the State or County.

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10 Docket Item ("D.I.") 267.

11 *Quereguan v. New Castle Cty.*, 2010 WL 2573856, at *8 (Del. Ch. June 18, 2010).

Certain other exhibits were merely cumulative and I granted the motion to strike as to them.[12]

In accordance with Rule 144, and notwithstanding the Quereguans' untimely request for a new trial, I have reviewed *de novo* the evidence and arguments presented with respect to the issues decided in the Master's Final Report. My review necessarily focused on the potentially case dispositive issue of causation. This Memorandum Opinion reflects my findings of fact and conclusions of law on the issues presented.

C. The Facts

The standard of review in this Court as to a Master's findings of facts and conclusions of law is *de novo* under Rule 144. Nevertheless, "a new trial is not necessary if this Court 'can read the relevant portion of the factual record and draw its own conclusions.'"[13] In this case, the existing evidentiary record is more than adequate to resolve the issues before me; therefore, a new trial is unnecessary.[14] In performing the required *de novo* review of the Master's Final Report, this Court has examined an

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12 *Id*. at *7-10.

13 *Lynch v. Thompson*, 2009 WL 1900464, at *1 (Del. Ch. June 29, 2009) (quoting *Cartanza v. DNREC*, 2009 WL 106554, at *1 (Del. Ch. Jan. 12, 2009)).

14 While the standard of review is *de novo*, only when there is a "*bona fide* issue as to dispositive credibility determinations will a new hearing be inevitable." *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999). Here, there are no dispositive credibility determinations to be made because all the key testimony is that of experts. The weight to be accorded to the evidence provided by those expert witnesses does not turn on their veracity or credibility. Rather, it is a function of their qualifications, the facts they considered, the research, observations, and reasoning they performed or applied in this case, and the persuasiveness of their opinions.

unofficial copy of the entire trial transcript, each exhibit submitted by the parties, the pretrial briefs, the post-trial summations, and the supplemental exhibits included in Plaintiffs' Submission that I held were admissible.[15]

The Quereguans live at 320 Maple Avenue in Wilmington. The block on which they live contains the former Absalom Jones School and a playground with a ball field. The school building occupies the northern end of the block and its raised ball field occupies the block's center portion.[16] The block is bordered by Maple Avenue on the west, Cedar Avenue on the east, and Walnut Road on the south.[17] The land between the perimeter of the ball field and each of the bordering streets is divided into residential lots. The Quereguans' property faces Maple Avenue and abuts the raised ball field in the rear, beginning at the field's southwest corner and running northward.

The retaining wall at the center of this dispute was built sometime before 1975, and well before the Quereguans moved onto their property in 1995. Because the retaining wall around the ball field was built without weep holes for water to escape and to relieve pressure, the wall has cracked in various places, at least one of which is on the

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15 *Quereguan v. New Castle Cty.*, 2010 WL 2573856, at *7-9. These exhibits included prior motions and rulings in this case, case law, transcripts, letters, new photographs of the retaining wall, and a new video slideshow showing both water flowing from the retaining wall and damage to the interior of the Quereguans' home.

16 Pls.' Ex. ("PX") 7. Hereinafter, Plaintiffs' exhibits will be cited as "PX," Defendant New Castle County's exhibits will be cited as "DX-NCC," and Third-Party Defendant State of Delaware's exhibits will be cited as "DX-Del."

17 DX-Del. 3, Ex. B.

portion running along the back of the Quereguans' property.[18] In wet weather, surface waters on the ball field percolate downward through the soil and to some degree escape through these cracks onto the bordering residential properties.[19]

Topographically, the Quereguans' property is situated at a low point. The residential lots to the north slope downward toward the Quereguans' lot.[20] The raised ball field to the east also generally slopes downward from its northeast corner to the west and southwest border toward the Quereguans' lot.[21] The original topographical lay of the field is not known precisely,[22] and the parties dispute whether it was similar to the ball field's current topography, generally sloping from northeast to southwest. This issue is discussed *infra* Part.II.A.1.

Once water flowing from neighboring properties reaches the Quereguans' property, several obstacles prevent it from properly draining away. The Quereguans' property is relatively flat, with a one percent grade from its rear to its front by Maple

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18 PX 8 at 3; *see also* DX-NCC 2, Picture 1.

19 PX 8 at 3-4.

20 PX 7; Haskins T. Tr. 9-10.

21 PX 7; Seeberger T. Tr. 18, 21.

22 PX 8 at 5; Haskins T. Tr. 27. Official transcripts of the trial exist for the testimony of the following witnesses: Terrence Haskins; Eric Larrimore; David Naples; Joanne Quereguan; Robert J. Seeberger; and Lucjan Zlotnicki. The trial testimony of those witnesses is cited by giving the last name of the witness followed by "T. Tr." and the page number.

Avenue.[23] This is inconsistent with the applicable building code, which requires a grade of at least two percent.[24] Further, the property's soil contains silty clay, which makes it difficult for surface water to percolate down through the earth.[25] Water on the property does not flow easily downstream to the south and southwest because, among other things, the Quereguans' fence on the southern side of the property and a raised garden bed in the neighbor's yard impede its flow.[26] Additionally, structures within the Quereguans' backyard inhibit drainage in other directions. These structures include timbers that form walkways, a raised swimming pool, and two sheds; collectively, they impede drainage to the west and south and create depressions where water can collect or pond.[27] Because of these drainage impediments, surface waters flowing from the residential properties to the north and water weeping or jetting out of expansion joints and cracks in the retaining wall to the east tend to pool on the Quereguans' property.

The evidence also shows the existence of water-related damage inside the Quereguans' home. Mold or mildew grows on the walls, a swollen front door is jammed, and portions of the walls inside the home have separated from the roof.[28] The

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23 PX 8 at 2; Haskins T. Tr. 14.

24 Haskins T. Tr. 14.

25 PX 8 at 2; DX-Del. 3 (Haskins Report) at 2.

26 Larrimore T. Tr. 16-17; DX-Del. 3 at 3.

27 PX 8 at 1; DX-NCC 4 at 3; Larrimore T. Tr. 16-17; Zlotnicki T. Tr. 23-24.

28 Compl. Ex. E; PX 21.

Quereguans claim that, as a result of the mold and mildew inside their home, they have suffered serious physical problems.[29] The parties dispute, however, whether the water emanating from the retaining wall has caused any of the property damage or the physical injuries of which the Quereguans complain.

D. Parties' Contentions

The Quereguans contend that the County or its agents failed to properly maintain the retaining wall, causing it to distribute excessive amounts of water onto their property, thereby causing them harm. They also argue that the creation of the ball field and retention wall before 2002, when the County first began leasing from the State, caused additional water to run onto their property and was unreasonable. The Quereguans seek repair of the wall and damages for what they claim are resulting property damage and personal injuries.[30]

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29 PX 18.

30 The Quereguans state their claim for relief more expansively in their post-trial closing arguments: "We are seeking relocation expense . . . [and] reimbursement for both property damages, and Court and Legal expense. Our property damages claims will be for: Move out expenses, Remediation expenses, Ventilation replacement, Floor, Ceiling and wall replacement, Loss or diminution of the inherent value of my home, inability to use my property, Apartment rental expenses. . . . It appears that there is a cause and effect relationship between mold exposure and injuries to our body." Pls.' Closing Argument ¶ 17. Later, as part of the previously mentioned Plaintiffs' Submission, the Quereguans also sought an injunction requiring Defendants to repair the wall. D.I. 267 at 2. Because all of Plaintiffs' claims depend upon their ability to prove causation and they failed to meet that burden, I need not discuss further the forms of relief they seek.

The County avers that because it does not control or own the ball field, it cannot be accountable for any damage caused by poor maintenance of the field. The County also urges the Court to deny the Quereguans' claims because they have not shown that their property, which is at the bottom of a low hill, receives more water than it would have if the natural topography had not been changed. In addition, the County claims that no evidence demonstrates a direct causal link between the excess water and the harm for which the Quereguans seek relief. Furthermore, the County contends that the proximate cause of the property damage was slipshod construction and maintenance work on the home, not water coming from the retaining wall. Finally, the County seeks indemnification from the State for any damages it may incur in connection with this matter. The County based that claim on its assertion that the State breached its contractual obligations under the 2002 Lease. The State has raised a number of defenses to the County's claim, including the reasonable user doctrine, a lack of causation, and failure to show the State breached its lease agreement with the County.

Because causation and harm are necessary for liability to attach here, I address those issues first.

II. ANALYSIS

A. Natural Flow, Reasonable User, and Nuisance Doctrines

An upper landowner unquestionably has the right to drain water by means of its natural flow toward downstream properties.[31] In situations where an upper landowner

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[31] *Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 502 (Del. 1980).

has done something to alter or "artificially . . . increase the flow of his waters downstream" and causes "material" harm, Delaware courts balance the interests of the parties and determine whether a particular use is reasonable.[32] This reasonable user test balances the utility derived by the upper landowner from his development against the amount and forseeability of harm that he created by altering the flow of surface waters toward downstream property.[33] In situations where a downstream landowner would be the natural recipient of upstream surface waters, the upstream landowner may nonetheless incur liability if he, by development or otherwise, artificially alters the course of waters flowing downstream so as to increase their volume, acceleration, or concentrated output onto downstream properties in ways that cause material injury.[34] In assessing whether a particular use is reasonable, courts consider the social value of improving land through development.[35]

1. Artificial increase in surface water

Implicit in the reasonable user doctrine is the presumption that the upper landowner has done something to alter the flow of surface waters on downstream properties. Therefore, as an initial matter, the Quereguans must demonstrate that the

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32 *Id.* at 502-03, 505.

33 *Id.* at 502.

34 *See Ciconte v. Shockley*, 75 A.2d 242, 244 (Del. Ch. 1950) (noting that liability can accrue to one who "by artificial means," collects and discharges "surface water in increased and unnatural quantities," onto the property of another to his "substantial injury").

35 *Weldin Farms*, 414 A.2d at 502-03.

County or someone whose actions might be attributed to the County has, by artificial means, altered the flow of surface waters onto their property.[36] They can meet that burden, for example, by demonstrating that the retaining wall has in some way altered the volume or concentrated the discharge of water flowing onto their property in a way that is injurious.[37]

The Quereguans' primary allegation relates to the volume of water entering their property from the retaining wall. On this point, the Quereguans relied on the trial testimony of their sole expert, Robert J. Seeberger, a professional engineer for twenty-six years and partner in the engineering firm of Boston and Seeberger P.C. Seeberger has bachelor and masters degrees in civil engineering from Drexel University and Villanova University, respectively, and is experienced in drainage and hydrology design and

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[36] *Id.* at 502. The Quereguans might show, for example, that the construction of the retaining wall and ball field artificially altered the flow of water onto their property in a way that caused harm. As noted by the Master in his Final Report dated October 8, 2009, however, even if they made that showing there would be other legal issues that the Quereguans would need to overcome, such as whether a leaseholder should be liable for an improvement in existence before they assumed the lease. Also, the County's claim against the State is dependent on demonstrating that the State failed to maintain the retaining wall. *See Quereguan v. New Castle Cty.*, 2006 WL 1215193, at *4 (Del. Ch. Apr. 24, 2006). No evidence was presented at trial regarding maintenance of the retaining wall.

[37] *See Chorman v. Anne's R. Co.*, 54 A. 687, 690 (Del. 1901) (instructing the jury that it could only find the defendant liable if the defendant's conduct in digging a ditch caused additional water to enter the plaintiff's field); *Ciconte*, 75 A.2d at 244 (noting that water which is "collected and discharged in mass at a given point" can be injurious); *Weldin Farms*, 414 A.2d at 502 (stating that the reasonable user rule applies in situations where an upper landowner has done something to "artificially . . . increase" the flow of surface waters downstream).

investigations. Seeberger's staff visited the Quereguans' property and he personally visited it once, a week prior to the trial before the Master. According to Seeberger, the Quereguans' property was "taking a larger volume than it would naturally, [if] the [retaining] wall and the ball field [had] not been constructed."[38] Seeberger premised his conclusion on the assumptions that the original topography sloped from north to south, that the Quereguans' property covers about 4,000 square feet in area, and that it received surface waters from half to two-thirds of the ball field, a surface area of about 40,000 to 50,000 square feet.[39] Seeberger also speculated in his report that, had the original topography been retained, water on the Quereguans' property may have discharged onto the State's property.[40] At trial, however, he admitted that the latter statement was purely conjecture and not based on any evidence.[41]

The County and State proffered testimony from two experts concerning water volume. The first was Dr. Lucjan Zlotnicki, an engineer with multiple degrees in mechanical engineering from Warsaw Technical University and the University of Pennsylvania. Zlotnicki worked as an architectural consultant and has experience dealing with site drainage. He testified that the slope of the original topography was likely from

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[38] Seeberger T. Tr. 24. Seeberger later testified that it was his "conclusion" that the Quereguans' property was receiving the "excess flow off of the Absalom Jones School property, above and beyond what [it] should be responsible to take." *Id*. at 30.

[39] *Id*. at 49-50.

[40] PX 8 at 5.

[41] Seeberger T. Tr. 47.

the northeast toward the south and southwest[42] and that, absent the wall and fill, the surface water would have flowed across the Quereguans' property anyway because it lies at the lowest elevation.[43] Furthermore, Zlotnicki opined that the elevated ball field is graded in such a way as to cause some of the water to flow in other directions perhaps even away from the Quereguans' property.[44] Consequently, Zlotnicki concluded that the wall did not exacerbate the water problem on the Quereguans' property.[45]

The State's expert on this point, Terrance Haskins, is a civil engineer with a degree from the University of Delaware and expertise in storm water drainage and utility design. He agreed with Zlotnicki that the original topography likely sloped from the northeast to the southwest and down toward the Quereguans' property.[46] Based on elevations of the roads surrounding the block, which antedated construction of the ball field,[47] Haskins opined that the Quereguans' property may have received more water without the retaining wall than it receives with the retaining wall.[48]

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42 Zlotnicki T. Tr. 12.

43 *Id*. at 18.

44 *Id.* at 18-19.

45 *Id*. at 19.

46 Haskins T. Tr. 24.

47 *Id*. at 22-23.

48 *Id*. at 52.

Based on the testimony and reports of the various experts, I find that the Quereguans have not shown by a preponderance of the evidence that it is more likely than not that their property receives a larger volume of water now than it would have received before the ball field and retaining wall were constructed. Although Seeberger testified that the natural topography ran from north to south,[49] rather than from northeast to southwest, his assessment is not reliable for a couple of reasons. First, Seeberger's testimony directly contradicts that of Zlotnicki and Haskins, who each testified that the land sloped in a southwesterly direction toward the Quereguans' property.[50] Second, Seeberger based his conclusions on a land survey introduced into evidence by both the Quereguans and the State (the "Tetra Tech Survey"), which shows that the Quereguans' property lies at a lower elevation than other properties to the north and northeast and appears to corroborate the testimony of Zlotnicki and Haskins.[51] Nothing in the record demonstrates a credible basis for Seeberger's divergent testimony on this point. In that sense, the factual basis of his testimony is flawed. Therefore, this aspect of Seeberger's

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49 Seeberger T. Tr. 49.

50 Zlotnicki T. Tr. 18; Haskins T. Tr. 24.

51 Seeberger T. Tr. 25; DX-Del. 3, Ex. C; PX 7. The elevations at street level going north along Cedar Avenue of lots 9 through 6 on the eastern side of the Absolom Jones property range from 66.77 to 75.45 feet while the range of elevations beginning at the Quereguans' property (lot 24) and ending at lot 28 to the north along Maple Avenue is from 60.94 to 65.09 feet. *Id.* *See also* Haskins T. Tr. 10-11.

opinion is not based upon information reasonably relied upon by experts in the relevant field and deserves little weight.[52]

An additional problem with Seeberger's testimony is that it fails to account for drainage onto lots other than the Quereguans' property. Seeberger admitted that cracks existed elsewhere along the retaining wall that presumably distributed water from the field onto other properties as well.[53] Seeberger's report also noted that "[t]he lack of weep holes throughout the entire length of the wall forces the infiltrated stormwater to outlet through the cracks only, instead of being uniformly distributed among all neighboring lots."[54] Yet, the State's expert on this point testified convincingly that if weep holes existed in the retaining wall, more water would enter the Quereguans' property than currently enters it through the cracks.[55] Nevertheless, Seeberger opined that the Quereguans' lot received a disproportionate share of the water flowing from the Absalom Jones property.[56] Because Seeberger did not identify any specific evidence, tests, data, or scientific principles to support his opinion, however, I find his testimony on this point to be too conclusory to be either reliable or persuasive.

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52 *See Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010) (stating that generally, "the factual basis of an expert opinion goes to the credibility of the testimony."). Indeed, Seeberger admitted that he had no knowledge of the topography of the Absolom Jones property before the ball field was installed. Seeberger T. Tr. 49.

53 Seeberger T. Tr. 45.

54 PX 8 at 5.

55 *See* Haskins T. Tr. 20.

56 Seeberger T. Tr. 49-50.

To the contrary, the record suggests that the Quereguans' property receives less surface water now than it would have with the natural topography. Both Zlotnicki and Haskins credibly testified that the retaining wall surrounding the ball field likely reduced the volume of water that otherwise would have flowed onto the Quereguans' property because it dammed some of the water and redirected other water away from the property.[57] Furthermore, Seeberger testified that the swale the County erected on the field in approximately 2002 carries some of the water that otherwise would flow toward the Quereguans' property back toward the school and out to Maple Avenue, thus reducing the amount of water seeping into the ground and migrating through the cracks.[58]

Seeberger appears to have based his opinion that the Quereguans' property receives a disproportionate share of the water from the Absalom Jones property, at least in part, on the amount of water that ponds on their property. Although the evidence shows that some of that ponding may be due to structures on the property that impede drainage from the backyard, Seeberger disagreed. In response to a question from Quereguan at trial, Seeberger stated that: "The structures that you have in your backyard, in my opinion, have very little impact on the drainage from your backyard."[59] But that statement seems inconsistent with the observation Seeberger made in his expert report dated February 21, 2008 that: "The flatness of the Quereguan property along with the

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57 Zlotnicki T. Tr. 18-19; Haskins T. Tr. 74.

58 Seeberger T. Tr. 26-27, 29.

59 Seeberger T. Tr. 52.

presence of multiple structures inhibits surface water from the backyard to drain efficiently toward Maple Avenue. Offsite stormwater pouring out of the cracks from the aforementioned retaining wall, as testified by Javier Quereguan, only exacerbates the already impeded drainage."[60] Because Seeberger did not cite any specific facts, testing, or scientific principle to buttress his essentially conclusory trial testimony on this point, I do not accord his testimony much weight.

In summary, having carefully considered all of the relevant evidence, I find that the Quereguans failed to meet their burden to prove that their property currently receives more surface water than it would have under the original topography.

2. Material injury

For liability to attach, the Quereguans must demonstrate not only that the County created an artificial condition that altered[61]or increased the flow of surface waters onto their property, but also that the altered flow caused material injury.[62]

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60 PX 8 at 3.

61 Delaware Courts have recognized that liability can also attach when water is collected and discharged in concentrated quantities. *Ciconte v. Shockley*, 75 A.2d 242, 244 (Del. Ch. 1950). The Quereguans did not press this point at trial as their allegations primarily related to an artificial increase in the volume of surface water. Assuming for the sake of argument that the retaining wall does concentrate the flow of water through cracks or expansion joints in an unnatural manner, the claim would still fail because a concentrated discharge in and of itself is insufficient to create liability. *See Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 504-05 (Del. 1980) (applying the reasonable user doctrine). The Quereguans also would have to demonstrate that this alteration in flow caused material injury. *Id.* at 503-04 (citing *Staats v. Hubbard*, 64 A.2d 826, 858 (Del. Ch. 1949)). As discussed later in this section, all of the injuries asserted here are due to the allegedly increased volume of water ponding in the Quereguans' yard. There is no

The Quereguans assert that the unnatural flow has caused three different forms of damage: (1) loss of use and enjoyment of their property, (2) structural damage from mold and land settlement, and (3) personal injuries from exposure to mold. Unquestionably, the Quereguans' use and enjoyment of their property is materially impaired by the stagnant water that ponds in their yard. The numerous photographs and slides the Quereguans have put in evidence illustrate in graphic detail the problems they have experienced from having too much water on their property. Their plight is lamentable and understandably evokes concern and sympathy. The question, however, is whether the County or, indirectly, the State caused those conditions or otherwise is responsible for them. I must answer that question based on the evidence presented, legal and equitable precedent, and this Court's rules.

Based on the record before me, the Quereguans have failed to prove by a preponderance of the evidence that the retaining wall or the ball field is the proximate cause of the ponding problem itself. In Delaware, proximate cause is defined as something that "in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have

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allegation made, or evidence to suggest, that the discharge of water from cracks in the retaining wall has resulted in some other sort of injury. Therefore, no further analysis on the possible discharge of more concentrated quantities of water onto the Quereguans' property is warranted.

[62] *Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 503-04 (Del. 1980) (citing *Staats v. Hubbard*, 64 A.2d at 858).

occurred."[63] If there are two or more causes of an injury, liability attaches only if it can be said that but for a party's neglect, the injury would not have occurred.[64]

Here, it is undisputed that water enters the Quereguans' property from several sources, including precipitation falling from the sky, surface waters flowing from upstream residential properties, and water coming through cracks in the retaining wall. As such, there is no single source of the water. Furthermore, expert witnesses Seeberger, Haskins, and Zlotnicki all agreed that the causes of ponding on the Quereguans' property include the grade of the land, silty soil, clay-based impermeable surfaces, and structural barriers such as a raised swimming pool, lumber-lined pathways, concrete slabs, embankments, fences, and a raised garden downstream.[65] Because the ponding results from a combination of water entering the Quereguans' property and the presence of numerous obstacles preventing the proper drainage of water away from their property, this is a situation where there are two or more causes of the harm. Moreover, based on the evidence, this Court cannot say that but for the retaining wall and raised ball field

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63 *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000) (quoting *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995)) (internal quotation marks omitted).

64 *Id.*

65 Seeberger T. Tr. 33-34, 42; Zlotnicki T. Tr. 23-24; Haskins T. Tr. 15-18.

there would be no ponding problem or the amount of water remaining on the Quereguans' property would be materially less.[66]

The Quereguans' claim that the water from the ball field and wall harmed their home also is not borne out by the evidence. As for the structural damage and mold, the County's witnesses and exhibits persuasively demonstrate that this damage to the home was not caused by the mere ponding of water from precipitation or otherwise on the property, but by structural and maintenance issues in the home itself. Both Zlotnicki and David A. Naples, a building inspector for the County, noted that exposed rigid insulation and wood acted like wicks to absorb moisture upward and into the home's walls.[67] Naples further found that, among other things, faulty fascia and soffit installation, damaged vinyl siding, a leaky roof, cracking window caulk, and an improperly designed downspout gutter were the chief causes of interior damage.[68] He observed that portions of the Quereguans' property sit within a depression or "bowl" which causes water to run toward their house and remain there, rather than drain away from it.[69] Naples also found no evidence of significant structural damage to the slab from settling soil caused by the

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66 *See* DX-Del. 3 (Haskins Report) at 3. ("The sources of most of the drainage problem of the Quereguan property are inherent to the property itself. . . . If no water at all came through the retaining wall, the existing on-site conditions would cause similar drainage problems.").

67 Zlotnicki T. Tr. 20-21; DX-NCC 1 ¶ 3.

68 DX-NCC 1 ¶¶ 1, 2, 6, 8, 9.

69 Naples T. Tr. 10-11.

presence of water.[70] The Quereguans' evidence did not effectively refute Naples's or Zlotnicki's findings on this issue. Therefore, the Quereguans failed to meet their burden of demonstrating that something related to the retaining wall or the raised ball field proximately caused the claimed damage to their home.

3. The Quereguans' personal injury claims

The Quereguans' personal injury claims depend upon many of the same facts underpinning their property damage claims. They allege that mold growth which resulted from water seeping into their home, caused them to suffer various physical ailments.[71] Master Glasscock granted summary judgment in favor of the County on these personal injury claims in a Report dated April 22, 2008. Plaintiffs filed exceptions to that ruling and I stayed any further proceedings regarding it until the issue of causation was resolved. Because the Quereguans have not shown that any action for which the County arguably might be responsible caused the interior mold and other allegedly harmful conditions that they contend led to the health problems that gave rise to their personal injury claims, those claims also fail.

III. CONCLUSION

The facts of this case are distressing. Poor grading, faulty or neglected repair work, and unfavorable topography have combined to create terrible problems for the

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70 *Id.* ¶ 10.

71 Am. Compl. ¶ 13.

Quereguan family.[72] A perfect property free from defect may be difficult to find, but some properties have more than their fair share of problems. That appears to be the case with the Quereguans' property.

Javier Quereguan proceeded in a dedicated, persistent, and commendable way to litigate and ultimately try his case to the best of his ability. In the end, however, the Quereguans were unable to demonstrate either that the County caused their problems by artificially increasing the volume of surface waters flowing onto their property or that the water emanating from the retaining wall was the proximate cause of harm to their property or persons.

For the reasons stated in this Memorandum Opinion, the Quereguans' claims against the County are dismissed with prejudice. As a result of that dismissal, the County's third-party claim against the State is moot and is also dismissed. Similarly, the issues raised in the State's motions for summary judgment on the grounds of sovereign immunity and the 2002 Lease are now moot and need not be addressed further. The Court is entering an Order and Final Judgment reflecting these rulings on this date, as well. As indicated in Supreme Court Rule 6, the time for filing an appeal to the Delaware Supreme Court from this or any of the other rulings in this case begins to run with the entry of that Order and Final Judgment.

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[72] *See* Joanna Quereguan T. Tr. 6-10.